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**BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

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In the Matter of the Accusation Against:

Case No. AC-2008-26

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HILARIO PENA, JR.
141 West Dana Street, Suite 101
14 Nipomo, CA 93444

A C C U S A T I O N

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Certified Public Accountant Certificate
No. 68342

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Respondent.

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Complainant alleges:

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PARTIES

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1. Complainant Patti Bowers brings this Accusation solely in her official

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capacity as the Executive Officer of the California Board of Accountancy (Board), Department

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of Consumer Affairs.

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2. On or about January 20, 1995, the Board issued Certified Public

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Accountant Certificate No. 68342 to respondent Hilario Pena, Jr. The certificate was expired

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and not valid for the period March 1, 2003, through January 29, 2008. Effective January 30,

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2008, the certificate was renewed through February 28, 2009.

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JURISDICTION

3. This accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 5100 states:

"After notice and hearing the board may revoke, suspend, or refuse to renew any permit or certificate granted under Article 4 (commencing with Section 5070) and Article 5 (commencing with Section 5080), or may censure the holder of that permit or certificate for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

....

"(c) Dishonesty, fraud, gross negligence, or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards that indicate a lack of competency in the practice of public accountancy or in the performance of the bookkeeping operations described in Section 5052.

....

"(g) Willful violation of this chapter or any rule or regulation promulgated by the board under the authority granted under this chapter.

....

"(i) Fiscal dishonesty or breach of fiduciary responsibility of any kind.

"(k) Embezzlement, theft, misappropriation of funds or property, or obtaining money, property, or other valuable consideration by fraudulent means or false pretenses."

5. Section 5050 of the Code provides in pertinent part:

"(a) Except as provided in subdivisions (b) and (c) of this section, in subdivision (a) of Section 5054, and in Section 5096.12, no person shall engage in the practice of public accountancy in this state unless the person is the holder of a valid permit to practice public

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1 accountancy issued by the board or a holder of a practice privilege pursuant to Article 5.1
2 (commencing with Section 5096).¹

3 6. Section 5051 of the Code provides in pertinent part:

4 “Except as provided in Sections 5052 and 5053, a person shall be deemed to be
5 engaged in the practice of public accountancy within the meaning and intent of this chapter if he
6 or she does any of the following:

7 (a) Holds himself or herself out to the public in any manner as one skilled in the
8 knowledge, science, and practice of accounting, and as qualified and ready to render professional
9 service therein as a public accountant for compensation.

10 (b) Maintains an office for the transaction of business as a public accountant.

11 (c) Offers to prospective clients to perform for compensation, or who does
12 perform on behalf of clients for compensation, professional services that involve or require an
13 audit, examination, verification, investigation, certification, presentation, or review of financial
14 transactions and accounting records.

15 (d) Prepares or certifies for clients reports on audits or examinations of books or
16 records of account, balance sheets, and other financial, accounting and related schedules,
17 exhibits, statements, or reports that are to be used for publication, for the purpose of obtaining
18 credit, for filing with a court of law or with any governmental agency, or for any other purpose.

19 (e) In general or as an incident to that work, renders professional services to
20 clients for compensation in any or all matters relating to accounting procedure and to the
21 recording, presentation, or certification of financial information or data.

22 (f) Keeps books, makes trial balances, or prepares statements, makes audits, or
23 prepares reports, all as a part of bookkeeping operations for clients.

24 (g) Prepares or signs, as the tax preparer, tax returns for clients.

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27 1. Section 5050 was amended in 2004 and again in 2006 without substantially changing
28 the earlier version in terms of prohibiting the practice of public accountancy without a
certificate issued by the board of this state.

1 (h) Prepares personal financial or investment plans or provides to clients products
2 or services of others in implementation of personal financial or investment plans.

3 (i) Provides management consulting services to clients.

4 The activities set forth in subdivisions (f) to (i), inclusive, are "public
5 accountancy" only when performed by a certified public accountant or public accountant, as
6 defined in this chapter. . . ."

7 7. Section 5070.5, subdivision (a), of the Code provides:

8 "A permit issued under this chapter to a certified public accountant or a public
9 accountant expires at 12 midnight on the last day of the month of the legal birthday of the
10 licensee during the second year of a two-year term if not renewed. To renew an unexpired
11 permit, a permit holder shall, before the time at which the permit would otherwise expire, apply
12 for renewal on a form prescribed by the board, pay the renewal fee prescribed by this chapter and
13 give evidence satisfactory to the board that he or she has complied with the continuing education
14 provisions of this chapter."

15 8. California Code of Regulations, title 16, section 3 provides:

16 "(1) Each licensee shall notify the Board of any change in his or her address of
17 record within 30 days after the change. The address of record is public information. If the
18 address of record is a post office box or mail drop, the change of address notification
19 shall include the street address of either the licensee's primary place of employment or
20 his or her residence.

21 "(2) For purposes of this section, "licensee" includes any holder of an active,
22 inactive, suspended, or expired certified public accountant license or public accountant license
23 issued by the Board which is not canceled or revoked.

24 "(3) All notification required under this subsection shall be in writing and shall be
25 signed by the licensee."

26 9. California Code of Regulations, title 16, section 87 provides:

27 "(a) 80 Hours.

28 "As a condition of active status license renewal, a licensee shall complete at least

1 80 hours of qualifying continuing education as described in Section 88 in the two-year period
2 immediately preceding license expiration, and meet the reporting requirements specified in
3 subsection (a) of Section 89. A licensee engaged in the practice of public accountancy as
4 defined in Section 5051 of the Business and Professions Code is required to hold a license in
5 active status. No carryover of continuing education is permitted from one two-year license
6 renewal period to another.

7 “(b) Government Auditing Continuing Education Requirement.

8 A licensee who engages in planning, directing, conducting substantial portions of
9 field work, or reporting on financial or compliance audits of a governmental agency shall
10 complete 24 of the 80 hours required pursuant to subsection (a) in the areas of governmental
11 accounting, auditing or related subjects. This continuing education shall be completed in the
12 same two year license renewal period as the report is issued. A governmental agency is defined
13 as any department, office, commission, authority, board, government-owned corporation, or
14 other
15 independent establishment of any branch of federal, state or local government. Related
16 subjects are those which maintain or enhance the licensee’s knowledge of governmental
17 operations, laws, regulations or reports; any special requirements of governmental agencies;
18 subjects related to the specific or unique environment in which the audited entity operates;
19 and other auditing subjects which may be appropriate to government auditing engagements.
20 A licensee who meets the requirements of this subsection shall be deemed to have met the
21 requirements of subsection (c).

22 “(c) Accounting and Auditing Continuing Education Requirement.

23 A licensee who engages in planning, directing, performing substantial portions of
24 the work, or reporting on an audit, review, compilation, or attestation service, shall complete 24
25 hours of the 80 hours of continuing education required pursuant to subsection (a) in the course
26 subject matter specified in this subsection. Course subject matter must pertain to financial
27 statement preparation and/or reporting (whether such statements are prepared on the basis
28 of generally accepted accounting principles or other comprehensive bases of accounting),

1 auditing, reviews, compilations, industry accounting, attestation services, or assurance
2 services. This continuing education shall be completed in the same two-year license renewal
3 period as the report is issued. If no report is issued because the financial statements are not
4 intended for use by third parties, the continuing education shall be completed in the same
5 two-year license renewal period as the financial statements are submitted to the client.

6 “(d) A licensee who must complete continuing education pursuant to subsections
7 (b) and/or (c) of this section shall also complete an additional eight hours of continuing
8 education
9 specifically related to the detection and/or reporting of fraud in financial statements. This
10 continuing education shall be part of the 80 hours of continuing education required by
11 subsection (a), but shall not be part of the continuing education required by subsection (b) or
12 (c). This requirement applies to licensees who renew their licenses on or after July 1, 2005.

13 “....

14 “(g) Failure to Comply.

15 A licensee’s willful failure to comply with the requirements of this section shall
16 constitute cause for disciplinary action pursuant to Section 5100(g) of the Accountancy Act.”

17 10. California Code of Regulations, title 16, section 87.7 provides in pertinent
18 part:

19 “(a) In order to renew a license in an active status a licensee shall, within the six
20 years preceding the license expiration date, complete a continuing education course on the
21 provisions of the Accountancy Act and the Board of Accountancy Regulations, application to
22 current practice, and other rules of professional conduct. Such course shall be approved by
23 the Board prior to the licensee receiving continuing education credit for the course and shall
24 be a minimum of 8 hours.

25 11. California Code of Regulations, title 16, section 94 provides:

26 “Failure to comply with these continuing education rules by a licensee engaged in
27 public practice, as defined in Business and Professions Code Section 5051, constitutes cause for
28 disciplinary action under Section 5100.”

12. Section 5109 of the Code states:

“The expiration, cancellation, forfeiture, or suspension of a license, practice, privilege, or other authority to practice public accountancy by operation of law or by order or decision of the board or a court of law, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to commence or proceed with any investigation of or action or disciplinary proceeding against the licensee, or to render a decision suspending or revoking the license.”

13. Section 5107, subdivision (a) of the Code states:

"The executive officer of the board may request the administrative law judge, as part of the proposed decision in a disciplinary proceeding, to direct any holder of a permit or certificate found to have committed a violation or violations of this chapter to pay to the board all reasonable costs of investigation and prosecution of the case, including, but not limited to, attorneys' fees. The board shall not recover costs incurred at the administrative hearing."

FIRST CAUSE FOR DISCIPLINE

(Dishonesty, Fraud)

14. Respondent is subject to disciplinary action under section 5100, subdivision (c), on the grounds of unprofessional conduct, in that he committed fraudulent and dishonest acts in the practice of public accountancy from December 12, 2002, through November 2, 2006, when respondent misappropriated \$211,207.33 of client A.C.'s funds for his own personal use. The circumstances are as follows:

a. On or about December 31, 2001, Ms. A.C.² (hereinafter, “client A.C.”) engaged respondent as her accountant. On July 30, 2004, client A.C. executed a durable power of attorney entrusting respondent to, inter alia, conduct, engage in, and transact all business, property, and other matters including, preparing and filing her state and federal income tax returns and investing the proceeds from the sale of property. Client A.C. had authorized

2. Client names have been omitted for privacy reasons. The names and contact information for the client(s) involved in this accusation will be disclosed upon receipt of a proper request for discovery.

1 respondent to make her tax payments for her out of one of her bank accounts for several years.
2 In 2004, client A.C. decided to place a home she owned in Ramona, California up for sale. In
3 2005, she sold the home. Client A.C. subsequently asked respondent several times what he had
4 done with the proceeds from the sale of the Ramona property. Respondent advised her he had
5 invested the money in second trust deeds at 12 percent. She asked him several times for an
6 accounting of the money, but he was always "too busy."

b. Respondent advised client A.C. that he was filing all of her tax returns with the proper agencies. However, respondent failed to timely perform tax return services for client A.C. for tax years 2002, 2003, 2004, and 2005, and he failed to file estimated tax payments for client A.C. in tax years 2003, 2004, and 2005. Client A.C. became aware of the delinquent tax returns in December 2006 when she received notice from the IRS that she owed back taxes and penalties for several years.

c. In conjunction with the tax matters, client A.C. obtained copies of her bank statements and determined that respondent had written some thirty-five checks to himself for personal purposes. On December 22, 2006, client A.C. notified respondent that she had revoked the durable power of attorney. In or about January 2007, respondent prepared transaction ledgers purportedly accounting for all of the "loans" he had made to himself. At the time respondent loaned himself money out of client A.C.'s accounts, the "loans" were undocumented, unsecured and unknown to client A.C. In addition, respondent failed to include in the ledgers two checks that he had paid himself as "loans" totaling \$7,275.00.

d. Client A.C. hired an attorney to recover her money plus interest from respondent. The “borrowed” funds plus interest were recovered by October 2007. Client A.C. hired another CPA to file her back tax returns and clear her account with the IRS.

SECOND CAUSE FOR DISCIPLINE

(Gross Negligence)

26 15. Respondent is subject to disciplinary action under section 5100,
27 subdivision (c), on the grounds of unprofessional conduct, for gross negligence in failing to
28 prepare multiple years of income tax returns for his client A.C., as described more fully in

1 paragraph 14 above and incorporated herein by reference as though re-alleged in full.

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3 **THIRD CAUSE FOR DISCIPLINE**

4 **(Fiscal Dishonesty or Breach of Fiduciary Responsibility)**

5 16. Respondent is subject to disciplinary action under section 5100,
6 subdivision (i), on the grounds of unprofessional conduct, in that Respondent knowingly
7 committed fiscal dishonesty, and/or, breached his fiduciary responsibility, by misappropriating
8 \$211,207.33 of client A.C.'s funds for his own personal use as described more fully in paragraph
9 14, above, and incorporated herein by reference as though re-alleged in full.

10 **FOURTH CAUSE FOR DISCIPLINE**

11 **(Embezzlement, Theft, Misappropriation of Funds, or Property)**

12 17. Respondent is subject to disciplinary action under section 5100,
13 subdivision (k), on the grounds of unprofessional conduct, in that Respondent embezzled, stole,
14 and/or, misappropriated funds or property, as described more fully in paragraph 14, above, which
15 is incorporated herein by reference as though re-alleged in full.

16 **FIFTH CAUSE FOR DISCIPLINE**

17 **(Practice without a Valid Permit)**

18 18. Respondent is subject to disciplinary action under Code section 5050,
19 subdivision (a), for practicing accountancy without a valid permit. The circumstances are as
20 follows:

21 a. Certified Public Accountant certificate number 68342 was issued to
22 respondent on January 20, 1995. Pursuant to Code section 5070.5, the certificate is subject to
23 renewal every two years. The applicable renewal period for this certificate begins March 1 of
24 odd-numbered years.

25 b. Certificate number 68342 expired on March 1, 2003, when the renewal
26 application received on February 22, 2003, was deemed deficient.

27 c. On May 5, 2004, pursuant to California Code of Regulations, title 16,
28 section 71, subdivision (c), the renewal application submitted to the Board on February 22, 2003,

1 was deemed abandoned and the renewal fee was forfeited.

2 d. Effective January 30, 2008, the certificate was renewed through February
3 28, 2009, when the Board received the renewal fee and declaration of compliance with
4 continuing education requirements.

5 e. The certificate was expired and not valid for the period March 1, 2003,
6 through January 29, 2008.

7 f. Respondent admits that during the years 2003 through 2007,
8 approximately 30 percent of his business consisted of preparing tax returns for individuals,
9 partnerships, corporations and trusts. Respondent further admits that in the same time frame
10 approximately 70 percent of his business consisted of performing a variety of bookkeeping
11 services, including payroll, bill paying, and some monthly and quarterly compilations for
12 approximately forty different clients.

13 g. In January and February 2007 respondent provided documents to A.C.'s
14 attorney indicating he was licensed as a CPA, while his certificate was delinquent.

15 h. Prior to his certificate being renewed effective January 30, 2008,
16 respondent represented himself on his website as a CPA offering professional services to
17 prospective clients, including accounting, compilation, review, audit and tax services.

18 **SIXTH CAUSE FOR DISCIPLINE**

19 **(Non-Compliance with Continuing Education Requirements)**

20 19. Respondent is subject to disciplinary action under Code section 5100,
21 subdivision (g), on the grounds of unprofessional conduct for failing to comply with continuing
22 education requirements to maintain an active certificate while engaged in the practice of public
23 accountancy from March 1, 2003, through January 29, 2008. The circumstances are as follows:

24 a. California Code of Regulations, title 16, section 87, subdivision (a),
25 requires, as a condition of active status license renewal, a licensee shall complete at least 80
26 hours of qualifying continuing education in the two-year period immediately preceding license
27 expiration.

28 b. Respondent failed to complete any of the required continuing education

1 until November 2007 when he completed 14 hours, December 2007 when he completed 27
2 hours, and January 2008 when he completed 54 hours.

3 c. In the two year period preceding February 2007, while practicing public
4 accountancy, respondent performed compilations for clients, thereby subjecting himself to the
5 requirement in California Code of Regulations, title 16, section 87, subdivision (c), to complete
6 24 of the 80 hours of continuing education in accounting and audit subject matter and to the
7 requirement of California Code of Regulations, title 16, section 87, subdivision (d), to complete
8 8 hours of the 80 hours in courses on fraud detection and reporting relating to financial
9 statements.

10 d. Respondent failed to complete the accounting and audit subject matter
11 courses until December 2007 and January 2008. Respondent failed to complete the fraud course
12 requirement.

13 e. Pursuant to title 16, California Code of Regulations section 87.7,
14 subdivision (a), respondent was required to complete a continuing education course on the
15 provisions of the Accountancy Act and the Board of Accountancy Regulations and other rules of
16 professional conduct within the six years preceding the license expiration date. Respondent did
17 not complete this requirement until January 29, 2008.

18 **SEVENTH CAUSE FOR DISCIPLINE**

19 **(Notification of Change of Address)**

20 20. Respondent is subject to disciplinary action under Code section 5100,
21 subdivision (g), for failing to notify the Board of his change of address within 30 days of the
22 effective date of the change. The Board's Renewal Unit sent a letter to Mr. Pena's address of
23 record. The letter was returned on September 7, 2007, as "Return to Sender Not Deliverable as
24 Addressee Unable to Forward." On February 13, 2008, respondent submitted a change of
25 address to the Board.

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PRAYER

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WHEREFORE, Complainant requests that a hearing be held on the matters herein
by reference alleged, and that following the hearing, the Board issue a decision:

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1. Revoking, suspending, or otherwise imposing discipline on Certified
Public Accountant License No. 68342, issued to Hilario Pena, Jr.;

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2. Ordering Hilario Pena, Jr. to pay the California Board of Accountancy the
reasonable costs of the investigation and enforcement of this case, pursuant to Business and
Professions Code section 5107; and

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3. Taking such other and further action as deemed necessary and proper.

DATED: December 10, 2008

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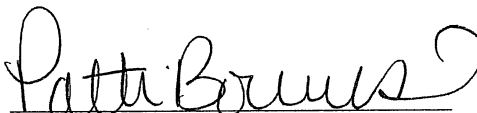
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PATTI BOWERS
Executive Officer
California Board of Accountancy
State of California
Complainant